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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

ROBERT R. SIMON, Petitioner, v. THE SUPERIOR COURT OF MENDOCINO COUNTY, Respondent; GALEN HATHAWAY, et al., Real Parties in Interest.	A151816 (Mendocino County Super. Ct. No. SCUK-CVG-09-54636)

This case involves an 82-acre parcel in Mendocino County, once owned entirely by plaintiff Robert R. Simon. When Simon got into financial difficulty, he sold an undivided 50 percent interest in the property to defendants Charles and Bedar Johnson. The transaction included an agreement that Simon and the Johnsons would attempt to subdivide the parcel into two lots. They were aware, however, that a subdivision was unlikely, since the parcel was below the minimum required under local planning laws. So they also agreed that, after two years, Simon could commence an action to partition the property in kind—thus, the genesis of the instant proceeding.

In the meantime, the financing deal the parties had arranged for the Johnsons' purchase of a 50 percent interest had become fairly complicated. Simon and the Johnsons agreed to jointly procure a loan of $202,500, the bulk of which was allocated to the Johnsons' purchase of an interest in the property, the remainder of which was

allocated to loan fees and paying off some of Simon's personal debts. Unable to secure conventional financing, they obtained a privately funded loan through a broker who had once worked for Simon. The note provided for interest-only payments, followed by a balloon payment of the principal and any unpaid interest. The note was secured by a deed of trust. After the balloon payment came due, the Johnsons, contrary to their agreement with Simon, unilaterally agreed to two seriatim modifications of the note. Neither the Johnsons nor the owners of the debt ever obtained Simon's agreement to or signature on either modification.

As pleadings proliferated in the partition action, the owners of the debt, which included defendants Galen Hathaway and Charles Ream, appeared and filed cross-complaints for an accounting, judicial foreclosure and declaratory relief.

Eventually the trial court held a bifurcated trial to determine the ownership interests in the property and the amounts owed to Hathaway and Ream, who by then were the sole owners of the note. The court ruled the second modification was the operative financial document, even as to Simon. It then found the principal amount owed was $314,000 and the accrued interest owed was $282,076.66 (as of March 1, 2017), for a grand total of $596,076.66, and that interest was continuing to accrue at $2,878.33 per month. The court declined to consider Simon's statute of limitations defense based on his claim that he was bound only by the terms of the original note and not by the modifications unilaterally obtained by the Johnsons.

Following entry of an "interlocutory judgment," Simon appealed, challenging the court's adverse rulings. Given the issues that were tried and the court's rulings flowing therefrom, we have serious doubt, for reasons that we have explained in a prior order, that Simon has appealed from a viable "interlocutory judgment" ordering partition under Code of Civil Procedure section 904.1, subdivision (a)(11). We have therefore treated his appeal as a petition for writ of mandate.

We conclude the trial court erred in ruling Simon was bound by the modifications to the note, but reject his statute of limitations defense that he claims flows from that conclusion. Our conclusion as to the basis of Simon's liability does, however, require

modification as to the amount he owes, and we therefore order that a writ issue requiring the trial court to vacate and modify certain portions of the "interlocutory judgment."

BACKGROUND

The facts are largely undisputed. Simon, a licensed real estate broker at the time of the transaction in question,[1] owned an 82-acre parcel in Mendocino County which he had acquired in 1977.[2]

By 2001, Simon was having financial difficulties. His property taxes were delinquent, and a notice of default had been filed in connection with a debt of "about $90,000," secured by a deed of trust on the property. The property was also burdened with a lien for $30,000 for unpaid child support.

To deal with these difficulties, Simon agreed to sell a portion of the property to the Johnsons for $165,000.

The Johnsons were introduced to Simon by Stephen Welch, who at one time had worked as a sales agent under Simon's real estate brokers license. During that time, Welch had also arranged for "hard money loans" for the purchase of real estate. Although the court found Welch "was working under Simon's real estate license," Simon was *not* Welch's employing broker after March 26, 2001. Accordingly, Welch was *not* employed by Simon at the time of the sale to the Johnsons, in October 2001.[3]

The sales agreement specified it was: "A contract for the purchase of real property described as a twenty acre +/- portion of . . . 10669 Hearst Road, an 82 +/- acre parcel,

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[1] Simon's real estate license was later revoked in 2010 on the basis of five misdemeanor drug convictions—two for possession of methamphetamine in 2005 and 2009, one for being under the influence of methamphetamine in 2007, one for possession of paraphernalia in 2007, and one for possession of marijuana in 2008.

[2] Simon testified the property was initially purchased with five partners, who did a "patent split" in the mid-1980's, after which he and his then wife, Deborah Simon, owned an 85-acre parcel.

[3] By the time this partition action got underway, Welch was no longer in the vicinity. Although named and served as a defendant, his default was entered in March 2010, and the trial court subsequently found "[t]o date, no one has been able to locate Mr. Welch."

that portion [more] particularly described as all the lands east of Scott Creek including the house therein located, with well (50%) and septic included, and approximately eight acres along the southerly boundary west of Scott Creek, such property to represent a fifty percent interest of subject parcel." It further stated it was "subject to a [] private agreement between the buyer and seller regarding land use matters," and that the "[b]uyer is aware that subject property is currently in foreclosure."

About a week later, Simon and the Johnsons executed the referenced "private agreement." It stated it was "an addendum to the contract . . . for the purchase of real property" and provided: "It is agreed that buyer is purchasing a twenty +/- acre portion, consisting of all seller's lands [along certain boundaries]. The remaining sixty[-]two acres are retained by seller. Each portion herein described are the exclusive domain of buyer and seller, reserved for the exclusive use of each party. [¶] [] The house, septic system, and well (50% interest) and 20 acres are the exclusive property of buyer for his sole use and responsibility."

The addendum also addressed refinancing and encumbrances on the property and specified: "Each party agrees to cooperate with the necessary or desired refinancing plans of the other, provided the rate and terms are agreeable to both parties. [¶] . . . [¶] Both parties agree not to encumber, hypothecate, or place property at risk of lien or violations, without written consent of other party." It additionally provided: "Either party may sell, transfer, or bequeath his separate interest in the property to others upon offering a first right of refusal to the other party."

The addendum further provided: "Both parties agree to pursue a subdivision, or other partition of the property as described, splitting costs and fees as appropriate, within six months of closing of escrow. After two years, either party may unilaterally apply for partition without opposition from other party."

In an effort to clear the property of all encumbrances, Simon and the Johnsons jointly sought financing for the transaction. A "regular bank loan" was not an option because of Simon's financial situation and because the property was in foreclosure. Accordingly, Welch organized a group of private investors who each provided a portion

of the loan amount and received a corresponding fractional ownership interest in the note, which was secured by a deed of trust.

The loan was for $202,500 at 11 percent simple interest per annum, to be repaid through interest-only monthly payments of $1,856.00 for three years. The principal, together with any accrued interest, was "due and payable at the option of the holder" on November 14, 2004. The note provided for "[a] late charge of ten percent . . . of each payment amount" if a payment was more than 10 days late and was secured by a deed of trust containing a power of sale. Most of the loan, specifically $165,000, covered the Johnsons' purchase of the 50 percent interest in the property. The balance was intended to cover Welch's fees and payoff of the $30,000 Simon owed for child support. The addendum thus stated the "buyer is responsible for that portion of the mortgage payment representing $165,000 plus loan proceeds designated for improvement. Seller is responsible for balance of appx. $30,000 portion of payment, to be determined at close of escrow."[4]

The "Borrower's Closing Statement" indicated, however, that after the proceeds of the loan were used to pay off the existing loan on the property, the lender's foreclosure fees, delinquent and current property taxes, and other fees, only $1,158.02 was left to be paid "to borrower." Simon testified he did not receive even this amount. Thus, in order to remove the $30,000 lien for unpaid child support, Simon arranged for a different loan from Welch for $30,000 after escrow closed. This loan was secured by a deed of trust on Simon's remaining 50 percent interest in the property.[5]

In regards to division of the property, Simon testified he "described to [the Johnsons] fully the process that would be required. We would first need to apply to the

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[4] Contrary to the trial court's finding, the *addendum* did not make Simon and the Johnsons "joint obligors who are jointly and severally liable to the beneficiaries" (i.e., the owners of the note). Rather, it was the original note that specified Simon and the Johnsons "jointly and severally promise to pay" the principal and interest owed.

[5] Later, the Johnsons purchased the second note from Welch in order to foreclose on the property. At that point, Simon's ex-wife paid off the second note and delinquent property taxes, and in exchange she and daughter received an interest in the property.

planning department for a lot split. I explained we would probably be turned down because we were below the minimum parcel size of 40 acres or 160 acres range land for the region and we would need to appeal to the planning department for a variance. [¶] If we were turned down for that, which was [a] reasonable possibility, we would need to appeal to the board of supervisors. If they turned down the variance, we would then need to appeal for a zoning change. . . . If that was turned down, we would need to apply for a general plan amendment."

After the sale, the Johnsons duly inquired with the county about subdividing the property. Charles Johnson testified at his deposition "they said it's impossible. . . . We could go through a bunch of stuff, but it was a lot of money and the lady advised us it wasn't going to make a difference."

At trial, a senior planner for Mendocino County testified the zoning for the property was "RL-160, which is range land 160-acre minimum." The property was "one legal parcel" of 82 acres. The planner testified that "if this were to come to the county tomorrow for a lot split on a lot split application . . . [¶] . . . [¶] . . . staff would be recommending denial of this for a subdivision."[6] She acknowledged that when applying for a zoning change, the board of supervisors had the authority to override the planning department.

Simon testified, in turn, that only one parcel in the "entire valley" around his property was 160 acres, and the rest of the parcels in the neighborhood were "noncompliant." Indeed, as we have noted, Deborah Simon owned a three-acre parcel created after a post-divorce "boundary line adjustment," which gave her a three-acre parcel and reduced Simon's property to 82 acres.

Simon also testified that in accordance with the addendum agreement, he made payments to Welch of $225 per month for the first three years, totaling $8,100.00. He had no written record of most of these payments, claiming a "drastic weather event []

[6] The court overruled Simon's objection that the planner was giving expert testimony and speculating.

wiped out" his files. Although some payments were in cash, Simon maintained "more often" they were by check. Simon's daughter testified that between 2001 and 2004, she made some of the loan payments on her father's behalf.

In November 2004, a few days before the maturity date of the note, the Johnsons negotiated and executed a modification, without Simon's consent or signature. The modification was also signed by Welch, as Coastal Mountain Mortgage, "[a]gent for beneficiaries." The modification stated in relevant part: "Beneficiaries agree to extend the term of said note and deed of trust for [an] additional 6 months. New maturity date of deed of trust is May 14, 2007." Thus, on its face, the specified additional term and due date do not match. As we recount in succeeding paragraphs, the subsequent conduct of the Johnsons and the holders of the note evidence the operative time provision was the 2007 date.

In 2006, Hathaway began purchasing interests in the note. He did so through Welch, and had no dealings or negotiations with Simon or the Johnsons. He also received payments through Welch, and had no contact with Simon or the Johnsons in this regard. In 2007, Ream similarly purchased an interest in, and received payments due under, the note through Welch. By the time of trial, Hathaway and Ream, together, owned 100 percent of the interest in the note. The two agreed, between themselves, that Hathaway held a 70 percent interest, and Ream, a 30 percent interest.

In 2007, the Johnsons negotiated a second modification of the note, again without Simon's agreement or signature. This modification named Hathaway as the payee and identified the five beneficiaries at that time, including Hathaway and Ream. It also changed the principal balance to $314,000 (replacing the $202,500 amount), specified the "[n]ew monthly payment is $2,878.33" (replacing the $1,856 amount), and extended the maturity date to December 14, 2007. Hathaway testified the new $314,000 principal amount was the sum of the original principal of $202,500.00 "plus accumulated interest." In other words, according to Hathaway, the accrued interest was capitalized, which effectively resulted in making that interest being compounded, rather than simple, interest.

After the new maturity date lapsed, the Johnsons, in February 2008, sold their 50 percent interest in the property to defendant Rodney DeFazio.[7] Charles Johnson testified at his deposition that he stopped making payments on the note at the time the sale closed, that he was "current with [the] interest payments" at the time, and that he had made his payments to Welch in cash.

About two months after purchasing the Johnsons' interest, DeFazio wrote a letter to the Simons. The letter stated in part: "As you are aware I have purchased the 50.00% ownership interest previously held by Charles and Bedar Johnson. [¶] I am assuming full responsibility for the current first mortgage of record which was signed by Mr. and Mrs. Johnson as well as by Robert Simon. I have been and will continue to make the monthly payments on this loan. [¶] I am also assuming full responsibility for the second mortgage placed on the property by Mr. and Mrs. Johnson. [¶] It is my intention to refinance these mortgages, using my 50.00% ownership interest in this property as well as my other properties that are in the same vicinity as the subject parcel. This will relieve you of any and all responsibility for the mortgage debt that is currently of record and will result in your 50.00% ownership being unencumbered. [¶] . . . [¶] My ultimate goal will be to work with you in order to have the property legally split through the County of Mendocino. I believe that if we work together we can reach this goal. I understand that it will take both time and money but I am willing to commit both to the project."

Apparently, DeFazio made monthly payments as specified in the second modification of the note until late 2008 and early 2009.

Because there was no dispute as to the ownership interests in the real property (the Simons owned 50 percent and DeFazio owned 50 percent), the focus of the bifurcated

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[7] The Johnsons thereby became "holders of a trust deed in the original amount of $231,200 secured by . . . DeFazio's one-half undivided interest" in the property. The trial court found that in March 2007, before they sold their interest to DeFazio, the Johnsons had also executed a deed of trust securing a $100,000 loan in favor of Faye Harrison. Because Harrison was deceased by the time of trial, and neither she nor her estate were served in the action, the court reserved jurisdiction to determine the amount and priority of that deed of trust.

trial was the amount owed on the debt held by Hathaway and Ream. As noted, the record of payments on the original note and pursuant to the two modifications was incomplete. Neither Simon nor the Johnsons had complete records. Welch and his records were long gone. Hathaway's records indicated he received payments through Welch fairly regularly, the last payment being received in February 2009. Ream's records similarly indicated he received payments from Welch through December 2008.

Hathaway and Ream, accordingly, called a certified public accountant, DorisAnn Hendricks, to fill the gap and testify as an expert to the amount owed on the debt. Hendricks reviewed the payment records provided by the prior and current beneficiaries. She, of course, did not review Welch's records since no one knew where they were.

Given the state of the records, Hendricks testified it was not possible to render an opinion as to the exact amount owed on the note. The most she could say was that there was no record of a balloon payment or "a significant paydown in principal."

Hendricks was then asked for her opinion as to the total amount due, assuming the following: the last payment made on the note to any of the beneficiaries was in February 2009, there had been no paydown of the principal since the inception of the loan, the holders of the note "for the period running from February 2009 to the present time are not asking for late charges," the note called for simple interest at 11 percent, and the principal due as of February 2009 was $202,500. Hendricks opined that under these assumptions, the interest owed was $22,275 per year, and the total accrued interest through October 2016 was $172,631.25. The total amount owed then, as of October 2016, principal and interest, was $375,131.25.

Hendricks was also asked to provide numbers assuming a principal amount, as of February 2009, of $314,000. Based on that amount, she opined "accrued principal and interest" as of October 2016 was $581,684.97. She had "no idea why that balance [$314,000.00] is that amount," and was "not defending that number . . . [¶] . . . [¶] . . . only the calculation."

Following the close of evidence, the trial court issued a statement of decision and an "interlocutory judgment." In its statement of decision, the court found Simon had not

signed either of the loan modifications. "[B]ut," said the court, it was "not convinced that he was totally ignorant of the transactions that occurred." The court also found "the extensions were of benefit to him as foreclosure of the property was avoided." The court therefore concluded Simon was bound by the Johnsons' actions and was liable on the note as twice modified.

As for the amount owing to Hathaway and Ream, the interlocutory judgment provided: "As of February 1, 2009, the balance due on the Hathaway/Ream Note and Deed of Trust was $314,000.00. Under the terms of the note . . . simple uncompounded interest accrues on this amount from February 1, 2009 forward at the rate of 11% per annum. As of March 1, 2017, the balance of principal and accrued interest due on the note was $596,076.66 ($314,000 plus 8 years of interest at $34,540 per year (February 1, 2009 through January 31, 2017), plus interest for the months of February and March, 2017 at $2,878.33 per month). Interest continues to accrue on the note in the monthly amount of $2,878.33, commencing on April 1, 2017. Interest on the note does not compound."[8]

The court refused to consider Simon's statute of limitations defense based on his assertion he was liable only on the original note and not on the later modifications. The court essentially ruled Simon had forfeited or waived any limitations defense because he had brought the partition action, stating the "parties agreed to first address the accounting at trial. Plaintiffs cannot now claim that the statute of limitations prevents the court from determining the interests of the parties and amounts owed to the beneficiaries."

DISCUSSION

Simon's appeal turns on two assertions: First, he maintains he is not bound by the modifications of the note the Johnsons unilaterally sought and obtained. Second, he maintains any claim based on the original note is barred by the statute of limitations.

[8] By the time of trial, DeFazio had settled with Hathaway and Ream for $5,000 and an agreement to convey his 50 percent interest to them on demand and not oppose foreclosure.

Both issues present questions of law we review de novo.[9] (*Arcadia Development Co. v. City of Morgan Hill* (2008) 169 Cal.App.4th 253, 260–261; *ASP Properties Group, L.P. v. Fard, Inc.* (2005) 133 Cal.App.4th 1257, 1266–1267.)

Simon is Not Bound by the Modifications Procured by the Johnsons

Principles Pertaining to Modification of a Note Secured by a Deed of Trust

Although the parties have consistently referred to the changes to the original note agreed to by the Johnsons and by Welch (on behalf of the holders and beneficiaries) as "modifications," technically the two documents differ. "There is a technical distinction between an extension and a renewal. An extension gives the same instrument effect for an additional period, whereas a renewal substitutes a new obligation and generally requires the execution of a new instrument." (Miller & Starr, Cal. Real Estate (4th ed. 2018) § 13:110, p. 13-426.) "After the extension or renewal, the debtor is not in breach or default so long as the amended or renewed terms of the indebtedness are performed. It also extends the statute of limitations on the debt." (*Id.* at pp. 13-426–13-427, fn. omitted.) The parties can agree to extend the time for the payment of a secured obligation, and that "extension gives the same instrument effect for an additional period." (*Id*. at p. 13-426.)

"An agreement that provides for an extension or renewal of the period for performance on the part of the trustor or mortgagor . . . must be in writing and executed with the formalities that were required for the original creation of the security instrument." (Miller & Starr, Cal. Real Estate, *supra*, § 13:111, p. 13-430; Civ. Code, § 2922.) The agreement must also "be signed by the party against whom it is being enforced. . . ." (Miller & Starr, at p. 13-431; Code Civ. Proc., §§ 360, 360.5.)

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[9] Hathaway and Ream assert, "The standard of review for an interlocutory judgment of partition is abuse of discretion." (*Cummings v. Dessel* (2017) 13 Cal.App.5th 589, 597.) However, even under that standard, a " 'disposition that rests on an error of law [] constitutes an abuse of discretion.' " (*Ibid.*) Furthermore, the bifurcated trial focused on Hathaway's and Ream's cross-claims, which were not for partition, but for an accounting, judicial foreclosure and declaratory relief.

Principles Pertaining to One Cotenant Encumbering the Entirety of the Shared Estate

Similarly, " '[o]ne cotenant cannot, without special authority from the other cotenants, encumber the entire estate, and any deed of trust, mortgage or other encumbrance given by only one cotenant affects only his interest in the property.' " (*King v. Oakmore Homes Assn.* (1987) 195 Cal.App.3d 779, 783, quoting 2 Miller & Starr, Cal. Real Estate (rev. 1977) § 13:8, p. 453.) " 'One cotenant may encumber his undivided interest in property without the consent of the other tenants; the encumbrance affects his interest only. [Citations.] A creditor may levy only on the interest of the debtor joint tenant [citations].' " (*Estate of Baumann* (1988) 201 Cal.App.3d 927, 936.) "Because each co-owner owns less than full fee title to the property, each can encumber only its own undivided interest (not the entire fee)." (Greenwald, et al., Cal. Practice Guide: Real Property Transactions (The Rutter Group 2018) § 12:32, p. 12-10, italics omitted.)

Simon is Not Bound by the Modifications

Under the principles we have recited above, the first modification to which the Johnsons and Welch agree was an "extension" of the note, as it made only one change—it extended the due date for payment of the principal and any accrued interest that was owed. (See Miller & Starr, Cal. Real Estate, *supra*, § 13:110, pp. 13-426–13-428.)

The second modification was a "renewal" of the note, as it made a number of changes—it extended the maturity date, provided the new principal balance was $314,000 and the new monthly payment was $2,878.33, and set forth the then-current beneficiaries and their respective percentage interests. (See Miller & Starr, Cal. Real Estate, *supra*, § 13:110, pp. 13-426–13-428.)

As discussed above, whether an "extension" or a "renewal," the modifications had to be in a writing and signed by Simon to be enforceable against him. They were not. Accordingly, Simon remained liable only as set forth in the original note, and the trial court erred in ruling he was bound by the terms as set forth in the second modification.

While Hathaway and Ream paint Simon as an unscrupulous wheeler-dealer and claim "equity" should bar him from relying on contractual "niceties," they are hardly in a position to complain. They were fully aware Simon was a joint obligor on the note they purchased. Yet, they apparently made no effort to contact him, let alone obtain his approval of and signature on either modification. This failure is particularly problematic as to the second modification, the "renewal" of the note, as it increased the principal amount and capitalized the interest that Hathaway claimed was unpaid. In short, what the record reflects is that Hathaway and Ream made a tactical decision to essentially ignore Simon and look solely to the Johnsons and then to DeFazio to pay off the loan. There is no evidence that Simon engaged in any conduct vis-à-vis Hathaway and Ream that lead either to think Simon considered himself bound by the modifications unilaterally obtained by the Johnsons.

The Statue of Limitations Does Not Preclude Hathaway's and Ream's Claim on the Debt

Since Simon is not liable under the note as modified and is liable only on the original note, we turn to his claim that Hathaway's and Ream's claims against him are time-barred. The original note was due and payable on November 14, 2004. Hathaway and Ream made no claim against Simon until 2012 and 2015, respectively, when they filed their cross-complaints.[10]

The trial court refused to consider Simon's statute of limitations defense, reasoning as follows: "Simon argues that the statute of limitations bars relief in this action and that no amount is due and owing to Hathaway and Ream. This court disagrees. First, Hathaway and Ream are defending a partition action in which the court is required to determine the status and priority of all liens upon the property and to grant relief sought by the parties. (Code Civ. Proc.[,] § 872.630(a).) The court has the power to order an accounting as well. (Code of Civ. Proc.[,] § 872.140.) The parties agreed to first

[10] Both cross-complaints sought an accounting and judicial foreclosure based on the original note, which the cross-complaints alleged was executed by Simon and the Johnsons in November 2001.

address the accounting at trial. Plaintiffs cannot now claim that the statute of limitations prevents the court from determining the interests of the parties and amounts owed to the beneficiaries."

That Simon brought a partition action and named all parties with any arguable interest in the property did not forfeit his right to assert that Hathaway's and Ream's claims against *his* 50 percent interest, as opposed to the Johnson/DeFazio 50 percent interest—are time-barred. "[W]hether the action is in equity or in law a statute of limitations is applicable." (*Estate of Peebles* (1972) 27 Cal.App.3d 163, 166.) "The accounting is merely ancillary to the perfection of plaintiff's right under the oral contract, and that aspect of the action should not operate to avoid the effect of a statute prescribing a period of limitation with respect to the right basically in issue." (*Jefferson v. J. E. French Co*. (1960) 54 Cal.2d 717, 719.) Nor did Simon's acquiescence to "first address[ing] the accounting at trial" operate as a waiver of the statute of limitations. "No waiver shall bar a defense to any action that the action was not commenced within the time limited by this title unless the waiver is in writing and signed by the person obligated." (Code Civ. Proc., § 360.5.) The record contains no such written waiver by Simon.[11]

Simon acknowledges, however, that "the filing of a complaint may toll the statute of limitations for a claim asserted in a cross-complaint." "Ordinarily the statute of limitations will bar a cross-complaint in the same fashion as if the defendant had brought an independent action, unless the original complaint was filed before the statute of limitations on the cross-complaint had elapsed." (*Liberty Mut. Ins. Co. v. Fales* (1973) 8 Cal.3d 712, 715, fn. 4.) "As a general rule, the filing of a complaint tolls the statute of limitations applicable to a cross-complaint so long as the cross-complaint is related to the original complaint and its causes of action were not barred when the original complaint was filed. [Citation.] 'Such a cross-complaint need only be subject-matter related to the

[11] Simon raised the defense of the statute of limitations in his answer to Hathaway's cross-complaint. His answer to Ream's cross-complaint is not in the record.

plaintiff's complaint—i.e., arise out of the same occurrence . . . —to relate back to the date of filing the complaint for statute of limitations purposes.' [Citation.] ' "The principle underlying the rule that a statute of limitations is suspended by the filing of the original complaint is that the plaintiff has thereby waived the claim and permitted the defendant to make all proper defenses to the cause of action pleaded." ' " (*California-American Water Co. v. Marina Coast Water Dist.* (2016) 2 Cal.App.5th 748, 763.)

This tolling doctrine applies to both compulsory and permissive cross-claims. (*ZF Micro Devices, Inc. v. TAT Capital Partners, Ltd*. (2016) 5 Cal.App.5th 69, 73.) "[A] defendant's cross-complaint against the plaintiff, irrespective of whether it is related to the matters asserted in the complaint, is entitled to the benefit of the tolling doctrine." (*Id*. at p. 92.)

Accordingly, in the trial court, Simon maintained he filed his complaint after the applicable limitations period ran, namely the four-year statute of limitations applicable to written contracts (Code Civ. Proc., § 337, subd. (a)). According to Simon, "[r]espondents' action for an accounting was based on a breach of contract, i.e., failure to pay under the Note." He filed his complaint for partition on September 3, 2009, four years and 9 months after the original note matured on November 9, 2004.

Hathaway and Ream asserted the applicable statute of limitations is the six-year statute applicable to negotiable instruments (Cal. U. Com. Code, § 3118). This statute provides in pertinent part: "[A]n action to enforce the obligation of a party to pay a note payable at a definite time shall be commenced within six years after the due date or dates stated in the note. . . ." (Cal. U. Com. Code, § 3118, subd. (a); *Cadle Co. v. World Wide Hospitality Furniture, Inc*. (2006) 144 Cal.App.4th 504, 514, fn. 8.) Thus, "[w]hile the statute of limitations for a contract, obligation, or liability founded on a written instrument is generally four years, an action to enforce the obligation of a party to pay a note payable at a definite time must be commenced within six years after the due date or dates stated in the note . . . ." (Miller & Starr, Cal. Real Estate, *supra*, §13:161, p. 13-636, fn. omitted.) A note is " 'payable at a definite time' if it is payable on elapse of a definite period of time after sight or acceptance or at a fixed date or dates or at a time or

times readily ascertainable at the time the promise or order is issued, subject to rights of (1) prepayment, (2) acceleration, (3) extension at the option of the holder, or (4) extension to a further definite time at the option of the maker or acceptor or automatically upon or after a specified act or event." (Cal. U. Com. Code, § 3108, subd. (b).)[12]

The original note here specified that on November 14, 2004, "the remaining unpaid principal sum, together with accrued interest, shall become immediately due and payable at the option of the holder thereof," thus coming within the statutory definition of "payable at a definite time" and bringing the note within the ambit of the six-year statute.[13]

A cause of action for accounting "is an equitable proceeding which is proper where there is an unliquidated and unascertained amount owing that cannot be determined without an examination of the debts and credits on the books to determine

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[12] At oral argument, in asserting California Uniform Commercial Code section 3118 does not apply, Simon's counsel cited to Civil Code section 882.020, which, in turn, refers to Civil Code section 2911, which, in turn, states, in pertinent part: "A lien is extinguished by the lapse of time within which, under the provisions of the *Code of Civil Procedure*, . . . 1. An action can be brought upon the principal obligation." (Civ. Code, § 2911, subd. (1).) Counsel claimed these Civil Code sections pertain specifically to real property and therefore govern, rather than the more general Commercial Code. And since these Civil Code sections refer specifically to the Code of Civil Procedure, counsel claimed the limitations period therein, rather than in the Commercial Code, applies. The two Civil Code sections counsel cited pertain to the enforceability and extinguishment of *liens* created by debt instruments pertaining to real property and the availability of judicial and nonjudicial foreclosure of such liens (separate and apart from an action on the underlying note). This Court discussed this complicated area of the law, which deals with clearing title of the burden of " '[a]ncient [m]ortgages,' " at length in *Ung v. Koehler* (2005) 135 Cal.App.4th 186, 192–200. As the discussion in *Ung* makes clear, these Civil Code statutes have no applicability to the present dispute. (See Miller & Starr, Cal. Real Estate, *supra*, §§ 13:161, 13:163, 13:164, 13:165.)

[13] A " 'pure' " demand note is one "lacking any due date." (*Cadle Co. v. World Wide Hospitality Furniture, Inc.*, *supra*, 144 Cal.App.4th at p. 514, fn. 8.) Even if the note were considered payable on demand after November 14, 2004, the tolling doctrine would still apply because where "no demand for payment is made to the maker, an action to enforce the note is barred if neither principal nor interest on the note has been paid for a continuous period of 10 years." (Cal. U. Com. Code, § 3118, subd. (b).)

what is due and owing." (*Prakashpalan v. Engstrom, Lipscomb & Lack* (2014) 223 Cal.App.4th 1105, 1136–1137.) It "is treated as a cause of action available to a wronged fiduciary [citation], which is subject to the statute of limitations governing the nature of the underlying wrong." (*Glue-Fold, Inc. v. Slautterback Corp*. (2000) 82 Cal.App.4th 1018, 1023, fn. 3.) Likewise, an action for judicial foreclosure is subject to the statute of limitations on the underlying obligation. "The running of the statute of limitations on an obligation underlying a mortgage or deed of trust bars judicial foreclosure as well as an action to enforce the obligation." (*Aviel v. Ng* (2008) 161 Cal.App.4th 809, 817, fn. 4.)

Accordingly, although not for the reason identified by the trial court, but by virtue of the tolling doctrine and the six-year limitations period applicable to notes payable at a definite time, Simon has no statute of limitations defense to Hathaway's and Ream's claims based on the original note.

The Amount Simon Owes Must Be Modified

Because the trial court erred in ruling Simon is liable under the modifications, its findings as to the amounts he owes for principal and accrued interest are also in error. Given the state of the record, however, no further trial is needed to recalculate his liability on the original note.

The parties do not dispute that the principal owed on the original note was, and remains, $202,500. Until February 2009, payments were made (apparently by the Johnsons and DeFazio) in accordance with the second modification. Accordingly, Simon's liability on the original note for that period of time was clearly satisfied.

Because the records of payments were incomplete or missing, Hathaway and Ream concede that if the principal balance was $202,500 rather than $314,000, simple interest should accrue commencing in February 2009. Thus, the accrued simple interest owed by Simon, as Hendricks calculated, is $22,275 per year and $1,856.25 per month. Accordingly, the total amount owed to Hathaway and Ream on the original note from March 1, 2009 through April 1, 2017 (the date of the interlocutory judgment) is

$384,412.50 ($202,500.00 in principal, plus $178,200.00 in interest for eight years, plus $3,712.50 in interest for two months).[14]

DISPOSITION

Let a peremptory writ of mandate issue directing respondent superior court in *Simon v. Hathaway et al*. (Super. Ct. Mendocino County, No. SCUK-CVG-09-546-36) to vacate its interlocutory judgment of April 21, 2017, and to enter a new and different judgment in accordance with this opinion. Parties to bear their own costs in this proceeding.

[14] In the trial court, Hathaway and Ream expressly did not seek to recover any late payment fees.

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Banke, J.

We concur:

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Humes, P.J.

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Margulies, J.

A151816, *Simon v. Hathaway*